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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERIC KARL BAULER, Defendant and Appellant.	H026320 (Santa Clara County Super. Ct. No. CC240073)

Following a trial by jury, defendant Eric Karl Bauler was convicted of 11 counts of sexual offenses against a child. In this appeal, defendant asserts instructional error. We find no merit in defendant's claims and we affirm the judgment.

BACKGROUND

Defendant was convicted of sex crimes against a family member. According to the victim, the abuse started at an early age, perhaps when he was as young as five years old, or possibly in the first or second grade. The acts included oral copulation and sodomy. On some occasions, the victim told the defendant he was hurting him; on other occasions, he told him not to do it; at times, the victim tried to get away. In February 2002, when the victim was 13 years old, he finally disclosed the abuse to his mother. Defendant was then arrested.

In a videotaped police interview following his arrest, defendant initially denied any sexual conduct with the victim. But soon thereafter, defendant acknowledged

wrongdoing, referring to himself as "an absolute animal." Later, he admitted oral sex with the victim. He also admitted having put his penis into the "crack" of the victim's "butt" though he denied penetration. Later still, he admitted that he may have inserted his penis slightly into the victim's anus after using baby oil. According to defendant's stated recollection, the incidents started when the victim was around 12 years old, or possibly 10, but certainly not as young as 9. As to the frequency of the abuse, he initially denied it took place even "once in a while," describing it as more like "every blue moon, every eclipse." When pinned down to a number, he denied that the abuse occurred more than 10 times, but later conceded that the frequency could have been once a week. Defendant stated that the victim never physically resisted him, though he may have said "I don't want to do this" or "This just doesn't seem right."

In August 2002, the Santa Clara County District Attorney charged defendant with 37 violations of the Penal Code.[1] The court later amended the information during trial, dismissing counts 12 through 37. The remaining 11 counts all charged defendant with aggravated sexual assault of a child under 14 and at least 10 years younger than the defendant. (§ 269.)

Trial proceedings began in late January 2003, with motions and jury selection. The presentation of evidence began in early February and concluded eight days later.

The prosecution witnesses included the victim and his mother, family friends who testified to defendant's general treatment of the boy, and an expert in child sexual abuse accommodation syndrome. The prosecution also played the videotaped police interview with defendant as well as taped telephone conversations between defendant and his wife while he was in jail.

[1] Unspecified statutory references are to the Penal Code.

At the close of the prosecution case, defendant took the stand in his own defense. Among other things, he testified that he orally copulated the victim about six times, when the child was 12. He did not threaten the victim. On one occasion, defendant placed his penis in the "groove" of the victim's buttocks, but there was no penetration, unless it was by accident. As to the videotaped statement he had made to police, defendant testified that he had initially denied the sexual activity out of embarrassment. Then, once he had admitted the conduct, the police tried to pin him down as to frequency. Though he was not sure of how often the abuse had taken place, defendant eventually decided to go along with what the police wanted and he told them that the frequency was once a week. He was just guessing and telling them what they wanted to hear. Defendant also testified about the victim's tendency to lie.

After the presentation of evidence, both sides argued to the jury. The primary defense theory was that defendant was not guilty of the charged offenses, which included the element of duress, though he may have been guilty of lesser-included offenses. Both sides argued witness credibility. The defense noted the victim's tendency to exaggerate. In rebuttal, the prosecutor urged the jury to discredit defendant's testimony, citing "the numerous times the defendant lied to you on the witness stand."

Following argument, the court instructed the jury. Without defense objection, the court gave the instructions at issue here: CALJIC 2.21.2, which addresses a witness's willfully false testimony, and CALJIC 2.62, which concerns a testifying defendant's failure to explain or deny evidence.

The jury deliberated for less than one full day before finding defendant guilty as charged on all 11 counts. In July 2003, the court sentenced defendant to serve 11 consecutive prison terms of 15 years to life.

Defendant brought this timely appeal.

CONTENTIONS

Defendant makes three claims of instructional error on appeal. Defendant's first two claims assert error in instructing the jury pursuant to CALJIC No. 2.21.2 and CALJIC No. 2.62. His third contention is that the errors were cumulatively prejudicial.

In response, the People assert that defendant waived his claims of error by failing to object to the challenged instructions below. On the merits, they deny that the court erred in giving either instruction; they further urge that any error was harmless.

DISCUSSION

In criminal cases, the trial court has an obligation to refrain from instructing on principles of law that are irrelevant and that may confuse the jury. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) Furthermore, before the court may instruct the jury that it is permissible to draw a particular inference, the evidentiary record must support the inference. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

The substantive question here is whether the court violated these precepts. A threshold question is whether defendant's claims of instructional error have been waived.[2]

Forfeiture

Defendant argues against forfeiture of his claims. He cites statutory authority that permits an appellate court to "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the

[2] More precisely, the question is one of forfeiture, not waiver. "Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right." (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) In cases such as this, "it is most accurate to characterize the issue as whether a defendant forfeits" a claim "by failing to timely raise" it below. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) We therefore address the issue as one of forfeiture. (*Ibid.*)

defendant were affected thereby." (§ 1259; see *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

The People acknowledge the general proposition that instructional errors affecting the defendant's substantial rights are not forfeited. But they assert that the errors claimed here do not affect defendant's substantial rights.

"Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim – at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

In light of the foregoing authority, we will review defendant's claims on the merits to determine the existence and effect of the asserted errors. As to each claim, we begin by explaining the legal principles that inform our analysis; we then apply those principles to the case before us.

CALJIC No. 2.21.2

The court instructed the jury pursuant to CALJIC No. 2.21.2 as follows: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who has testified falsely to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." "The instruction thus tells the jury it can distrust a witness who is willfully false in giving relevant or pertinent testimony." (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1496.)

As a general rule, this instruction is proper even where it appears to be directed principally to the defendant's testimony. (*People v. Beardslee* (1991) 53 Cal.3d 68, 94-95 [approving the predecessor instruction, CALJIC No. 2.21].) Describing an evidentiary record similar to that presented here, the *Beardslee* court explained: "Although the instruction does appear applicable principally to defendant's testimony, not all that

testimony was exculpatory. Indeed, neither side urged the jury to reject the whole of his testimony, because most of it, together with … his statement to the police introduced by the prosecution, constituted the backbone of the case against him." (*Id.* at p. 94.) "Thus, while the jury may well have applied the first sentence of the instruction ('A witness false in a material part of his testimony is to be distrusted in others') to defendant's testimony, it was highly unlikely to apply the second sentence by 'reject[ing] the whole testimony of' defendant." (*Id.* at pp. 94-95.)

Defendant acknowledges the general rule set forth in *Beardslee*, but he nevertheless urges error in the use of CALJIC No. 2.21.2 in this case, asserting that it impermissibly diminished the standard of proof to preponderance of the evidence. According to defendant, "there is serious doubt about the circumstances underlying these charges" given the "clear conflict in the evidence on the pivotal issue of duress." Defendant asserts that the jury was required to decide which "version of events" to accept – his or the victim's. He contends: "In such a case, CALJIC No. 2.21.2 can shift the jury's focus from a testing of the prosecution's evidence to a testing of the defendant's veracity …."

We reject defendant's contention.

First, we are not persuaded that the instruction improperly targeted defendant's credibility. To the contrary, as the People observe, the jury could have applied the instruction just as easily to several prosecution witnesses, whose testimony defendant disputed either directly or indirectly. For example, defendant characterized various aspects of the victim's testimony as "not true," "mistaken," and "incorrect." He described part of another prosecution witness's testimony as "absolutely" incorrect. Thus, there were several witnesses to whom the instruction could have applied. As our high court has observed, a defendant's testimony is not entitled to " 'preferential

treatment not granted to the testimony of any other witness.' [Citations.]" (*People v. Beardslee, supra,* 53 Cal.3d at p. 95.)

Additionally, as defendant acknowledges, the jury in this case was instructed pursuant to CALJIC No. 17.31, which cautions the jury that not every instruction may be applicable. (See, e.g., *People v. Johnson* (1993) 15 Cal.App.4th 169, 177.) Notwithstanding the court's general comment in the jury's presence concerning the preparation of instructions, we see no reason to assume that the jury considered any inapplicable instructions.

Finally, we find no basis here for distinguishing our high court's controlling precedent in *Beardslee.* There, the court implicitly rejected an identical defense claim that the instruction "increased his burden from that of raising a reasonable doubt of the sufficiency of the prosecution's evidence to one of affirmatively proving his defenses." *(People v. Beardslee, supra,* 53 Cal.3d at p. 94.)

In sum, we conclude, the court did not err in instructing the jury pursuant to CALJIC No. 2.21.2. The instruction did not improperly target defendant, nor did it impermissibly diminish the standard of proof.

CALJIC No. 2.62

The court also instructed the jury under CALJIC No. 2.62. The written form of the instruction given here reads as follows: "In this case defendant has testified to certain matters. [¶] If you find that [a] defendant failed to explain or deny any evidence against [him] introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within [his] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to explain or deny evidence against [him] does not, by itself, warrant an inference of guilt, nor does it

relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] [she] would need to deny or to explain evidence against [him], it would be unreasonable to draw an inference unfavorable to [him] because of [his] failure to deny or explain this evidence."

According to the California Supreme Court, CALJIC No. 2.62 "suffers no constitutional or other infirmity and may be given in an appropriate case." (*People v. Saddler, supra,* 24 Cal.3d at p. 681.) Its use is appropriate where the defendant has failed to explain or deny inculpatory evidence that was within his knowledge. (*Id*. at p. 682.) As our high court has often stated, " 'a defendant who elects to testify in his own behalf is not entitled to a false aura of veracity.' [Citations.]" (*People v. Beardslee, supra,* 53 Cal.3d at p. 95.)

Notwithstanding the precedent approving CALJIC No. 2.62, defendant challenges its use here on two grounds. First, he asserts that there was no evidentiary basis for the instruction, given his explanations and denials. Next, he restates his contention that the instruction impermissibly lightens the prosecution's burden of proof.

We find no merit in either of defendant's challenges.

We first consider defendant's explanations of the evidence against him. Based on our review of the record, we find these explanations lacking. As the People point out, defendant's testimony was filled with many unexplained memory lapses about significant events and details, including the circumstances prompting his first sexual contact with the victim, whether he ever warned the victim against disclosing the abuse, whether the victim ever complained of pain, and whether he ever ejaculated during any of his encounters with the victim. Defendant could reasonably be expected to remember and explain such details. Because he did not, the court was justified in concluding that he

failed to explain all of the inculpatory evidence within his knowledge. Thus, on this evidentiary record, it was proper for the court to give CALJIC No. 2.62.

We next address defendant's contention that this instruction impermissibly lowers the prosecution's burden. As discussed above, our state's high court has previously rejected that contention in connection with former CALJIC No. 2.21. (*People v. Beardslee, supra,* 53 Cal.3d at pp. 94-95.) We likewise reject it in connection with CALJIC No. 2.62. The instruction itself contravenes defendant's contention, given its explicit statement that the "failure of a defendant to explain or deny evidence against him does not … relieve the prosecution of its burden of proving … the guilt of the defendant beyond a reasonable doubt."

To sum up, we find no error in the use of CALJIC No. 2.62 in this case. The evidentiary record supports the instruction given the deficiencies in defendant's testimony, and the instruction does not diminish the prosecution's burden.

Cumulative Error

Defendant also claims cumulative error. In determining whether cumulative errors require reversal, "the litmus test is whether defendant received due process and a fair trial. Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence. [Citations.]" (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

Here, we find no such errors, either individually or collectively. There is no basis for reversal.

DISPOSITION

The judgment is affirmed.

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McAdams, J.

WE CONCUR:

_____
Elia, Acting P.J.

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Bamattre-Manoukian, J.